the parties.[10] A statement to that effect is to be found in *Holland v. McCarthy*,[11] the latest case on the subject, in which the California court in very plain terms reaffirms the principle it first enunciated fifty years ago.

E. W. D.

EVIDENCE: SUFFICIENCY OF NON-EXPERT OPINION.—The English and the early American judges did not condemn non-expert opinion in general, but only the mere opinion of the lay witness when not reënforced by facts of personal knowledge.[1] When, however, the phrase "opinion is not evidence" came to be carelessly passed along, the American courts seized upon the rule that the opinion of the lay witness was generally inadmissible, even though it was based on fact-knowledge.[2]

The severance of fact from opinion, demanded by this later American rule, is neither clear nor scientific.[3] No practicable and distinct line of demarcation can be struck between fact and opinion; the statement of simple facts, as the shape, size, or color of an object, embodies some judgment or opinion.[4] The most that can be said for an attempted distinction between fact and opinion is that the witness may be taken to state a fact when the judgment or opinion involved in that statement is so simple, usual, and instantaneous as to become a wholly unconscious inference.[5] Thus, if an ordinary witness states that he recognized a masked person in the night time by his voice or that a fire occurred three or four hours before dawn, he may be considered as stating a fact and not his opinion.[6]

In order to frame a workable rule for opinion evidence, the function of admissible opinion must be regarded. Non-expert opinion is allowed when the jury cannot otherwise be put into

---

[10] Campbell v. Thomas (1877), 42 Wis. 437, 24 Am. Rep. 427.
[11] (Oct. 30, 1916), 52 Cal. Dec. 499, 160 Pac. 1069.

[1] Carter v. Boehm (1766), 3 Burr. 1905, 97 Eng. Rep. R. 1162; Harrison v. Rowan (1820), 3 Wash. C. C. 580, 11 Fed. Cas. 658; Seibles v. Blackwell (1840), 1 McMull. 56; Wigmore, Evidence, § 1917.

[2] Albatross v. Wayne (1847), 16 Ohio, 513; Evans Ditch Co. v. Lakeside Ditch Co. (1910), 13 Cal. App. 119, 108 Pac. 1027; Cal. Code Civ. Proc., § 1845; Jones, Evidence (3d ed.), § 359.

[3] Kelley v. Richardson (1888), 69 Mich. 430, 37 N. W. 514; Hardy v. Merrill (1875), 56 N. H. 227, 22 Am. Rep. 441; Chamberlayne, Evidence (1912), § 1801; Wigmore, Evidence (1904), § 1919.

[4] Healy v. Visalia etc. Ry. (1894), 101 Cal. 585, 36 Pac. 125. "In almost every act of our perceiving faculties observation and inference are intimately blended. What we are said to observe is usually a compound result, of which one-tenth may be observation and the remaining nine-tenths inference." 2 Mill, Logic (3d ed.), p. 178.

[5] Thayer, Cas. on Evid. (1st ed.), p. 672, n.

[6] Ogden v. People (1890), 134 Ill. 599, 25 N. E. 755; Schwantes v. State (1906), 127 Wis. 160, 106 N. W. 237.

possession of all the facts of the case.[7] The lay witness is permitted to give his opinion in regard to handwriting, insanity, identity, value, and the like, since it is based on facts of personal knowledge which cannot be completely detailed to the jury.[8] Expert opinion, on the other hand, is admitted not because of a difficulty in presenting graphically the observed facts, but because the technical significance of the facts presented cannot be grasped by the jury.[9] Thus, where the jury as men of common knowledge cannot intelligently determine the exact cause of death from the symptoms and pathological conditions testified to, the opinion of the physician that deceased died of phosphorus poisoning is evidence of the correct conclusion to be drawn from these symptoms and conditions.[10] An opinion rule, in the last analysis, appears to be nothing more than a rule of administration, necessarily demanding the use of considerable judicial discretion, directed to the admission of only the best available evidence needed by the jury in order to come to a just and correct decision.[11]

The Supreme Court in *Northern California Power Company v. Walker*[12] shows a proper understanding of the function of non-expert opinion in its holding that it was error to allow the opinion of ordinary witnesses as to the carrying capacity of two ditches, where better evidence, in the nature of physical facts and conditions, was available. In rendering this decision, the court announces an excellent rule to govern the admission of opinion evidence. This rule is that, whenever possible, data to establish a given condition or fact must be introduced in evidence, and if scientific knowledge be necessary to formulate these data into the statement of the ultimate fact to be arrived at, this may be done by the opinion of experts; but when it is not possible to present these data to the court, the opinions of ordinary witnesses become admissible as the best available evidence.

F. H. M.

LANDLORD AND TENANT: EFFECT OF PROHIBITION LAWS UPON LEASES OF PREMISES FOR LIQUOR SELLING.—In view of the grow-

---

[7] Miller v. State (1910), 94 Ark. 538, 128 S. W. 353; Holland v. Zollner (1894), 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; Shafter Estate Co. v. Alvord (1906), 2 Cal. App. 602, 84 Pac. 279; Chamberlayne, Evidence (1912), §§ 1810, 1812, 1845; Wigmore, Evidence (1904), § 1924.

[8] San Diego Land Co. v. Neale (1888), 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; People v. Manoogian (1904), 141 Cal. 592, 75 Pac. 177; People v. Gray (1906), 148 Cal. 507, 83 Pac. 707; People v. Gordon (1910), 13 Cal. App. 678, 110 Pac. 469; Cal. Code Civ. Proc., § 1870 subd. 9, 10; Jones, Evidence (3d ed.), § 360.

[9] Parkin v. Grayson-Owen Co. (1909), 157 Cal. 41, 106 Pac. 210; Sillix v. Armour (Kan. 1916), 160 Pac. 1021; Chamberlayne, Evidence (1912), §§ 1811, 1845, 1955, 2377; Wigmore, Evidence (1904), § 1923.

[10] People v. Bowers (1888), 2 Cal. Unrep. Cas. 878, 18 Pac. 660.

[11] Baxter v. Chico Const. Co. (Sept. 20, 1916), 23 Cal. App. Dec. 439, 160 Pac. 1084; Scheck v. Barrett Nephews & Co. (1917), 162 N. Y. Supp. 417; Weiss v. Kohlhagen (1911), 58 Ore. 144, 113 Pac. 46; Wigmore, Evidence (1904), § 1929.

[12] (Feb. 7, 1917), 53 Cal. Dec. 192, 163 Pac. 214.